

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:

UNITED STATES OF AMERICA

CR-10-0074

-against-

:

United States Courthouse
Central Islip, New York

HERBERTO MARTINEZ,

Defendant.

:

January 17, 2012
2:15 p.m.

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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:

LORETTA E. LYNCH
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
BY: JOHN DURHAM, ESQ.
CARRIE CAPWELL, ESQ.
RAYMOND TIERNEY, ESQ.
Assistant United States Attorney

For the Defendant:

ELIZABETH MACEDONIO, ESQ.

Court Reporter:

Mary Ann Steiger
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6101

Proceedings recorded by mechanical stenography.
Transcript produced by computer.

Mary Ann Steiger, CSR
Official Court Reporter

1 THE COURT: I think we will start with -- before
2 we get to Mr. Ortega's motion, Mr. Ortega has a motion for
3 severance and, as Ms. Macedonio noted, she also has filed
4 a motion to sever certain counts with respect to her
5 client, and you're prepared to go forward on that,
6 Ms. Macedonio?

7 MS. MACEDONIO: Yes.

8 MS. RANTALA: Mr. Ortega would formally join in
9 that motion filed by Ms. Macedonio.

10 THE COURT: You did file a motion. The trial
11 will not be severed, the count should be severed.

12 MS. RANTALA: Yes, I would join in that and the
13 case law cited as well.

14 THE COURT: I want to ask the government, the
15 3500 material will be turned over so they know who the
16 witnesses are?

17 MR. DURHAM: The bulk has been, your Honor. We
18 have another round of 3500 that will probably go out today
19 as long as it's copied and scanned. If not today,
20 tomorrow.

21 THE COURT: Ms. Macedonio has proffered what she
22 believes some of the details are going to be that will be
23 offered at trial with respect to the murder of the two
24 year old boy, and I want a better understanding of what
25 the government's theory of accessory after the fact is and

1 what the proof will be with respect to that.

2 MR. DURHAM: Your Honor, with respect to
3 Mr. Martinez, he's charged in connection with the Arguetta
4 and Torres murders in a couple different ways.

5 First, he's charged with conspiracy to murder
6 Ms. Arguetta. He's also charged with a firearms offense
7 and the subsequent murder of her under an aider and
8 abettor theory.

9 The evidence at trial will show he conspired
10 with other MS-13 members beforehand. He agreed and
11 essentially authorized the murder of Ms. Arguetta and
12 helped the individuals who carried out that murder to
13 obtain a firearm which they used in the Arguetta and
14 Torres murder.

15 We're not introducing evidence that Mr. Martinez
16 had planned to kill Diego Torres or planned discussion of
17 that between him and the individuals who actually carried
18 out the shootings. Therefore, we did not charge him with
19 the subsequent murder of Diego Torres or the 924 J count,
20 causing the death with a firearm in connection with
21 Mr. Torres.

22 In terms of accessory after the fact, the
23 evidence will show that after the three individuals
24 carried out the Arguetta and Torres murders, Mr. Martinez
25 assisted them in a variety ways to evade law enforcement

1 and escape jurisdiction, including providing them with
2 housing, providing them with money and even when they were
3 in El Salvador, wiring money to them in El Salvador.

4 So essentially that's what the proof at trial
5 would show.

6 THE COURT: I understand what the charges are
7 against him.

8 In connection with proving up his involvement in
9 the conspiracy to murder Ms. Arguetta, as well as the
10 accessory after the fact, why would all these details that
11 Ms. Macedonio was pointing to, why would they be necessary
12 to prove up those charges against him?

13 MR. DURHAM: They may or may not, your Honor.

14 Part of it is ballistic evidence was recovered
15 at the scene of the Arguetta and Torres murders and that
16 evidence links to the Moreno murder as well as the Quijada
17 murder.

18 The gun found at the Quijada scene was used to
19 murder Moreno and also used to murder Arguetta and Torres.

20 The shell casings recovered at the scene, the
21 ballistics expert will testify that the shell casings
22 recovered at the scene of the Arguetta and Torres murder
23 matched the Moreno murder and were fired from the gun
24 recovered at the scene at the Quijada murder.

25 THE COURT: Let me see if I can focus it more.

1 I don't know whether they challenge that the
2 murders took place. I assume not.

3 I understand the Government has to prove the
4 underlying murder for the accessory after the fact.
5 That's an element in proving that.

6 If that's not going to be an issue in the case
7 because they're not challenging that, you can still put on
8 limited testimony regarding the fact that a murder or two
9 murders took place.

10 I don't understand why it would be necessary to
11 go into the details of what happened with respect to Diego
12 Torres to prove the crimes that are charged against him.
13 That's the bottom line question.

14 I don't know who your witnesses are. You're
15 going to have someone testifying he was involved in the
16 actual murders, or is it through other proof?

17 MR. DURHAM: A lot of the proof on that would be
18 through the defendant's own statements, his confession to
19 the Suffolk County Police Department. He confessed -- not
20 only to the Suffolk County Police Department as well as
21 the FBI -- he confessed to having prior involvement and
22 knowledge. They were plotting to kill Ms. Arguetta and
23 also providing assistance as an accessory after the fact.

24 Part of that is the individuals who carried out
25 the murders told him what happened and essentially

1 imparted the knowledge upon him and, therefore, knew they
2 had done those murders. So when he provided them
3 assistance, that would establish he was a knowing and
4 voluntary participant in the accessory after the fact
5 charge.

6 THE COURT: His statement, he admitted in his
7 statement that he was told the details of what happened
8 with respect to the murder; is that part of his statement?

9 MR. DURHAM: Yes, your Honor.

10 THE COURT: Including with respect to Diego
11 Torres?

12 MR. DURHAM: I believe so, your Honor. I have
13 to double check the statement. I don't have it in front
14 of me.

15 There is some discussion in terms of how the
16 murders were carried out. I don't know if it goes to the
17 level of detail that Ms. Macedonio brought out in her
18 motion about the child and the diapers and what not, but
19 he does acknowledge knowing who carried out the murders
20 and having knowledge how the murders were carried out.

21 THE COURT: In terms -- so his statement -- is
22 there other proof, other than proving up that the murder
23 happened through cooperating witnesses or otherwise, where
24 his knowledge of the details with respect to how the
25 murder was carried out would come up, or essentially it

1 would be with respect to his statement?

2 MR. DURHAM: Primarily it would be with respect
3 to his statement.

4 We would need to put in some evidence from the
5 crime scene to establish that two murders occurred and
6 certain evidence was recovered which then links to the
7 other crime scene.

8 THE COURT: Okay. Is there anything else you
9 want to add on the issue?

10 MR. DURHAM: I'm going to grab a copy of
11 Mr. Martinez' statement.

12 THE COURT: Ms. Macedonio, I think you
13 understand what I'm trying to figure out.

14 MS. MACEDONIO: It's exactly the problem we
15 have. While I understand that the government, you know,
16 he's charged with being an accessory after the fact and
17 the government will have to prove that up.

18 The problem that we have is I think it's
19 entirely unnecessary for the government to have to
20 establish that there was a murder of a two year old child.
21 They could simply establish that there was another
22 individual killed.

23 He's not charged with, nor did I advance that he
24 was charged with in my papers, the murder or the murder
25 conspiracy of Diego Torres.

1 The inflammatory nature of how they having
2 photographs or testimony about the brutal killing of a 14
3 month old little boy is entirely unnecessary for a count
4 that's an accessory after the fact when we have three
5 other murders that the defendant is charged with.

6 And in light of recent events, most of which
7 took place in Connecticut, we can go on and on about gun
8 violence in this country, that's going to be something
9 that really is sticking in the minds of these jurors and
10 there's a way to cure it.

11 First of all, the counts could be severed.
12 There's another defendant who is actually the shooter in
13 that, in those counts, Mr. Guzman, who is going to be
14 tried at a later time.

15 Those particular counts against Mr. Martinez
16 could be severed from this trial, thereby eliminating the
17 prejudice against both Mr. Martinez and Mr. Ortega.

18 Mr. Martinez could be tried on those counts with
19 Mr. Guzman at a later time, or the government could simply
20 strictly curtail what it is that they're going to elicit
21 from their witnesses, particularly in light of the fact
22 that he's not charged with the murder conspiracy of Diego
23 Torres.

24 THE COURT: I understand what you're saying.
25 There's two problems with severing it and putting him into

1 the Guzman trial for that charge. Those details are going
2 to come out at the Guzman trial, at least with respect to
3 that charge that's what would happen at the Guzman trial
4 for sure.

5 MS. MACEDONIO: Understood, but then there would
6 be no prejudice to spillover with the count that remains
7 in this case.

8 THE COURT: I understand that.

9 The other issue is with respect to that is as
10 you know the conspiracy with respect to that is part of
11 the racketeering count in this case. The government is
12 allowed to show a pattern.

13 They have to show your client was engaged in a
14 pattern of racketeering activity. For you to say to me
15 sever that racketeering act out, puts them at a
16 disadvantage because they have less than a pattern to show
17 the jury.

18 In a racketeering case I'm not aware of any case
19 law that says that you should strip a racketeering act out
20 because the nature of racketeering act, that murder
21 conspiracy to murder is worse than some of the other ones
22 because it could undermine the government's ability to
23 prove a pattern and in each case they have half of a case
24 in one trial and half of a case in another. What's your
25 response to that?

1 MS. MACEDONIO: I understand the court's
2 concern. I also have, in focusing on what your Honor your
3 inquiry that the Court had with regard to Mr. Durham and
4 why it's necessary to bring out all of these details with
5 regard to the child.

6 THE COURT: I don't think it's a severance
7 issue. I think they have a right to prove up these crimes
8 together. It's a Rule 403 issue with respect to what
9 details are necessary in an accessory after the fact case
10 if you were charged with murder. He's charged with being
11 an accessory, so that's why I asked the government those
12 questions. I want to point out why I think severance is
13 not the answer to this. I really think it's a question of
14 403.

15 Ms. Rantala, your client has different issues.
16 Part of it is on what details are going to come out
17 obviously in connection with that particular racketeering
18 act. I understand he's not charged with any aspect of
19 that crime either accessory or otherwise. Some of the
20 arguments you make hinge upon what kind of details are
21 going to come out with respect to Diego Torres, right?

22 MS. RANTALA: Yes.

23 And basically to reiterate to the Court he's not
24 charged with that particular conspiracy and any kind of
25 spillover affect would definitely be more prejudicial and

1 override any interest in judicial economy on Mr. Ortega's
2 part and 404 concerns are great as to Mr. Ortega. He
3 should not be tried after the New Town massacre and all
4 these other issues and the jurors having to be filled with
5 that kind of information and then this child is only 14
6 months. That's absolutely prejudicial. I don't know that
7 any normal juror could even overlook that and look at
8 these two individuals differently. How could Mr. Ortega
9 be involved in this sort of conspiracy related to another
10 conspiracy to murder a child, how could they -- how could
11 a jury possibly keep those two separate and apart. The
12 spillover affect is completely prejudicial.

13 THE COURT: Okay. Let me ask, if you look
14 through the statement, what details are in the post-arrest
15 statement, Mr. Durham?

16 MR. DURHAM: Your Honor, it's fairly lengthy.

17 The individuals that carried out the murder
18 describe to Mr. Martinez how they carried out the murder
19 which Mr. Martinez, when he's interviewed by Suffolk
20 County Police Department, he relays to them. There are
21 references in there to essentially the baby being killed.
22 Some of it is just references to the woman or Vanessa or
23 Diego which doesn't elucidate the fact you're talking
24 about the two year old child. In other portions he does
25 say the baby. That is in the signed written statement.

1 Just to follow-up on your Honor's point, if the
2 Court were to sever the Arguetta and Torres murders out of
3 this trial, the government would be unable to prove the
4 racketeering count at the secondary trial. If we went to
5 trial on the first two predicates, we would be left with a
6 single offense at the follow-up trial and we wouldn't have
7 a second predicate. Mr. Martinez is charged with three
8 predicate acts in the underlying indictment. To do so,
9 obviously, we could try to get the evidence as 404(b) or
10 something to that effect, but it would significantly
11 hinder our ability to bring this prosecution.

12 THE COURT: I understand that point but I think,
13 again, given what the charge is here and if that's his
14 statement and those couple references to the baby are the
15 only aspects of this trial that would make reference to
16 the age of the victim, I want the government to try and
17 see if there's a way they could prove this up without
18 getting into that issue.

19 It's not clear to me, and given what the charges
20 are against Mr. Martinez, given what the nature of the
21 government's proof is, that there can't be a way to work
22 around that because it creates not just an issue for him,
23 but obviously creates issues for Mr. Ortega who is not
24 charged with any aspect of that. It will create issues in
25 jury selection in terms of jurors who might otherwise

1 think they could be fair and impartial and upon hearing
2 that will say yes I don't think I could be fair and
3 impartial. It will complicate the jury selection and
4 create issues with respect to Mr. Ortega and obviously
5 with respect to Mr. Martinez itself even though his crimes
6 have to be kept -- not have to be, should be kept together
7 because of the issues that we have discussed in terms of
8 the government's obligation under the law to prove a
9 pattern of racketeering, and that does not mean that the
10 government needs to elicit these details in order to prove
11 that pattern especially, Ms. Macedonio, you're not going
12 to be challenging that the murder happened, right?

13 MS. MACEDONIO: No, your Honor.

14 THE COURT: Obviously there's case law. If you
15 want to enter into a stipulation. The government is
16 entitled to prove it's case but given all these issues I
17 want to go back and read the statement but I also want the
18 government, because I want time to think about this to see
19 if the government is willing to agree that for purposes of
20 this trial that obviously there will be plenty of
21 testimony that relates to any conspiracy. There's no
22 limitations on the evidence with respect to conspiring to
23 kill Ms. Arguetta or killing of Ms. Arguetta or
24 discussions afterwards or the statement with respect to
25 that. I want the government to try and find a way to,

1 even if there's reference that a second individual was
2 killed during that murder, to take out any reference to
3 the age of the victim.

4 MR. DURHAM: Yes, your Honor. I hadn't thought
5 through exactly what evidence we would need to curtail
6 along those lines.

7 THE COURT: I'm referring to the severance
8 motion. I want to see what your answer is to that before
9 I decide that.

10 MR. DURHAM: With respect to the written
11 statement, obviously that statement was taken in English.
12 All the other statements in this case were Spanish
13 statements. We would prepare typewritten redacted
14 versions of those to respond to the Bruton issues. One
15 possibility might be to similarly take the handwritten
16 signed statement, prepare a typed written version. It
17 won't seem unusual to the jury because the other statement
18 that will be admitted into evidence will be typed in the
19 same format. It won't necessarily raise a flag.

20 I would ask the Court to allow us to think it
21 through. I almost have to go through witness by witness
22 and exhibit by exhibit to see what we will be able to --
23 how we could curtail any unnecessary prejudice.

24 THE COURT: That's fine. On issues like that
25 you could speak to Ms. Macedonio about whether she's

1 satisfied with any redactions or other things you have to
2 do to address that issue, and she obviously might even
3 agree to some type of stipulation with regard to the
4 second individual that there be some stipulation to the
5 jury that in the course of the murder of Vanessa Arguetta,
6 a second individual was killed and leave it at that.

7 Is there anything else before we -- I'm
8 reserving on the severance and we will discuss that at the
9 conference next week. Anything else before we complete
10 that issue?

11 I'm now going to go into the issues of
12 Mr. Ortega's motion. The hearing will be the last issue.
13 You're free to stay. Do you want to stay for this? It's
14 up to you.

15 MS. MACEDONIO: No, your Honor, with all due
16 respect I would like to leave. If we are going to set a
17 status conference for next week, can we do that now?

18 THE COURT: Yes. 2:00 on the 23rd.

19 MS. MACEDONIO: That's fine. Thank you, Judge.

20 MR. DURHAM: Thank you. Your Honor, is there
21 any way the Court can do it a little bit earlier; 1:30,
22 1:00?

23 THE COURT: 1:00.

24 MS. MACEDONIO: Thank you.

25 THE COURT: 1:00 on January 23rd and obviously we

1 will discuss the questionnaire. I'll come back to the
2 issue of the government's expert and we will need to
3 address this issue, the severance issue as well.

4 MS. MACEDONIO: Thank you, your Honor.

5 THE COURT: Marshals, you can take Mr. Martinez
6 back.

7 (Proceedings in this matter are concluded.)

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